No. 178.

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JAMES H. MCKENNEY, Clerk

Supreme Court of the United States.

Filed Feb. 23, 1900.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - Plaintiff in Error,

vs.

A. L. SCHMIDT, TRUSTEE, et al., - Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Plaintiff in Error,*

vs.

A. L. SCHMIDT, Trustee, *et al*, - - *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

QUESTION.

The question involved in this case is simply this: Where a personal judgment is entered against A. B. for a specified sum of money, can an execution, or a rule to pay same, be issued thereon against C. D., who is not named in the judgment, and is not even a party to the cause? And if this is done, and C. D.'s property is taken to satisfy the judgment, is this "due process of law?"

This question arises out of the following

FACTS.

Before beginning the statement of facts a word of explanation is necessary as to the record. It contains much which we consider immaterial to the federal question, but while we made an agreement with defendant in error

(Rec., 317) by which a great mass of matter in the State Court record was omitted from this one, yet defendant in error was not willing to omit any more. When the motion to dismiss or affirm was heard we had an "Abstract of Record" printed for convenience, containing what we considered, and still consider, the material portions of the record, which is of course still before the Court. But as defendant in error relies on matters not in the abstract, we are thus compelled to refer to them. The opinions of the Court of Appeals, of which there are several, were omitted from the original record, under an agreement that the published opinions should be considered parts of the record as if copied therein. (Rec., 319.) But we have printed them in the Abstract for convenience of reference.

With this explanation of the record we now proceed with the statement of facts.

By an instrument dated July 2, 1879, the Northern Division of the Cumberland & Ohio Railroad Company (hereinafter called the "Cumberland & Ohio") executed a mortgage to Joshua F. Speed, Trustee, to secure a proposed issue of $350,000 of bonds. (Rec., 14.) The amount of the bonds was afterwards reduced to $250,000.

By an instrument dated July 28, 1879, this same Cumberland & Ohio leased its road for thirty years to the Louisville, Cincinnati & Lexington Railway Company. In this lease the execution of the mortgage just mentioned was recited, and the lessee agreed that if the earnings of the leased line should prove insufficient to pay the interest and provide a sinking fund for the payment of the principal of the lessor's aforesaid mortgage bonds, then the lessee (the Louisville, Cincinnati & Lexington Railway Company) would "supply the deficiency, so far as it may be done, by appropriating *the net earnings*, or so much as may be needed, *on*

its own lines, which may accrue by reason of business coming to it from or over said first party's line" (the leased line.) (Rec., 20.)

Contemporaneously with the execution of this lease the lessee, the Louisville, Cincinnati & Lexington Railway Company, executed to Joshua F. Speed (who was also trustee under the lessor's mortgage) a mortgage of net earnings on its own line arising out of business derived from the leased line, the contracting portion of which, following various recitals, is as follows, viz.:

"Now, in consideration of one dollar cash in hand "paid by said second party to said first party, and the "premises, the said first party has this day and does hereby "mortgage and put in lien all net earnings which may "accrue to it by reason of business coming to it from or "over said lines of the Northern Division of the Cumber- "land & Ohio Railroad Company to the said Joshua F. "Speed, as trustee aforesaid (who is the trustee for the "mortgage made by said Northern Division of the Cum- "berland & Ohio Railroad Company to secure said three "hundred and fifty bonds of one thousand dollars each): "Conditioned, that if the net earnings of said leased "premises do not prove sufficient to pay the interest and "provide for the sinking fund of said mortgage bonds, "then said first party, if all other sources of raising money "of said Northern Division of the Cumberland & Ohio "Railroad Company prove insufficient, will supply the "deficiency, so far as it may be done, by appropriating and "paying over promptly the net earnings, or so much "thereof as may be needed, on its own lines, which may "accrue by reason of business coming to it from or over "said Northern Division of the Cumberland & Ohio Rail- "road Company's lines for the purpose of discharging said "interest and sinking fund as they severally fall due." (Rec., 25.)

Joshua F. Speed, the trustee under these two mortgages, afterward resigned, and A. L. Schmidt, present defendant in error, was appointed in his place.

The lease heretofore mentioned from the Cumberland & Ohio to the Louisville, Cincinnati & Lexington Railway Company expressly provided that it was "not assignable without the consent of the grantor." (Rec., 6.) Nevertheless the lessee did assign it, and at the same time conveyed all the rest of the property of the lessee, the Louisville, Cincinnati & Lexington Railway Company, to the Louisville & Nashville Railroad Company, on November 1, 1881.

The lessor refused to consent to the assignment, but the assignee nevertheless entered upon and continued to operate the road. (Rec., 295.)

Schmidt, the trustee under the mortgages, knew, at the time it was made, of the general conveyance of all its property by the Louisville, Cincinnati & Lexington Railway Company, to the Louisville & Nashville Railroad Company, including the assignment of the lease held by the former on the Cumberland & Ohio. (Rec., 295.) But he doubtless also knew, as subsequent events seem to indicate, that the lessor had refused to consent to this assignment.

On October 12, 1885, Schmidt, as trustee for the bondholders, uniting with him certain individual bondholders, instituted this present action in equity against the Louisville, Cincinnati & Lexington Railway Company. (In Kentucky all civil judicial proceedings are "actions," and all final orders are "judgments," whether in equity or at law. We have no "suits" and no "decrees.") He pleaded the lease and mortgages heretofore mentioned (making no mention of the assignment of the lease); and then alleged that the last four gales of interest on the bonds had not been paid; and that the Louisville, Cincinnati & Lexington Railway Com-

pany had refused to pay them, although it had made large net earnings on its own lines out of business derived from the leased line. He said he did not know the amount of these earnings; and he prayed that the case be referred to the Commissioner to ascertain the amount thereof, and that the defendant, the Louisville, Cincinnati & Lexington Railway Company, be ordered to pay same into Court for payment of said interest.

The *Louisville & Nashville Railroad Company*, which, as before explained, and as plaintiff knew, was the assignee of the lease, and in fact the purchaser and in possession of all the property of the Louisville, Cincinnati & Lexington Railway Company, *was not made a party to this suit at all;* and of course, therefore, there was no allegation of any demand made *upon it* for earnings, or anything else. Plaintiff probably proceeded upon the theory that, as the Louisville, Cincinnati & Lexington Railway Company was a party to the agreements mentioned, it was bound by the covenants thereof, and that, as the lessor had refused its consent to the assignment to the Louisville & Nashville Railroad Company, it was at least doubtful if the latter was bound. But, whatever may have been plaintiff's reasoning on the subject, the fact remains that the Louisville & Nashville Railroad Company was not made a party to the action.

There was no attempt made to impound any earnings. No application for a receiver, and no attachment taken out. Neither was any lien claimed on the corpus of the property of the defendant. It was nothing more than a personal suit for an accounting between the two parties to a contract, in which the judgment finally entered, as will be presently noted, was "essentially a personal judgment, upon which the Court might have ordered execution to issue."

At the proper time the Louisville, Cincinnati & Lexington Railway Company filed its answer, which was very brief,

in which it denied that it had made any such net earnings as were alleged in the petition. (Rec., 33; Abstract, 12.)

Then began a long fight over the issue thus raised—several commissioners' reports, endless "statements," a wilderness of figures. During the course of the litigation the depositions of several officers of the Louisville & Nashville Railroad Company were taken, their official positions and the situation of the properties being plainly shown—no attempt whatever at concealment of anything. (Rec., 174–190.)

Finally on June 1, 1894, plaintiff succeeded in getting a judgment in the following form, viz.:

> "It is ordered that the motion for rule, as prayed on "May 28, 1894, be overruled, to which order plaintiffs "except; and it appearing to the Court that on the "$60,192.27 of earnings ascertained by report R. E. S. "No. 2, the defendant, Louisville, Cincinnati & Lexington "Railway Company, is entitled to a credit of $6,626.65, it "is allowed, and it is ordered that the balance of $53,- "565.62, as shown by said report, together with the inter- "est on the said earnings as they should have been applied "under the contract in payment of the interest on the "bonds, be paid into Court on or before the 11th day of "June, 1894, and a rule is awarded against defendants, "returnable on the 11th inst., to pay said sums of money "and interest into Court." (Rec., 214; Abstract, 15.)

Here was the final judgment in the action, simply an order to pay a specified sum of money into Court, a form of judgment which the Court of Appeals has since said in this action was "*essentially a personal judgment upon which the Court might have ordered execution to issue.*" (Abstract, 68; 47 S. W. Rep., 583.)

Plaintiff, however, did not choose to have an execution issued on this judgment. He preferred to proceed, as he had

a right to do, by process of contempt, and took a rule against the Louisville, Cincinnati & Lexington Railway Company to pay the money into Court.

Had execution issued it would have been returned "*nulla bona.*" And this was the response to the rule. (Rec., 215; Abstract, 16.)

Having failed to make his judgment out of the defendant in the action, plaintiffs, on May 27, 1895, offered to file "an amended and supplemental petition making the *Louisville & Nashville Railroad Company* a party to this suit." (Rec., 222.) *This was ten years after the original institution of the action and one year after final judgment had been entered therein.*

This "supplemental" petition here offered was an elaborate pleading alleging practically the same facts which had been alleged in the original petition against the Louisville, Cincinnati & Lexington Railway Company; but further alleging that *in 1881*, which was *four years prior to the institution of this suit*, the Louisville & Nashville Railroad Company had purchased the railroad of the Louisville, Cincinnati & Lexington Railway Company, and had received its earnings, and had conducted the defense of this suit against the Louisville, Cincinnati & Lexington Railway Company. And accordingly plaintiffs prayed that the Louisville & Nashville Railroad Company be made a defendant, and for judgment against it for the subjection of the earnings made on the railroad of the Louisville, Cincinnati & Lexington Railway Company. (Rec., 224–234). This supplemental petition is not copied into the Abstract of Record, because it was never allowed to be filed, and its statements were subsequently repeated in an affidavit, which was afterward filed, and which is copied into the Abstract, page 23.

The Court refused to allow this "supplemental" petition to be filed, or the Louisville & Nashville Railroad Company

to be made a party defendant; proceeding upon the principle well settled in Kentucky, and everywhere else, that when a final judgment has been entered in a cause and the time has passed in which the Court has control over its judgments, *the cause is at an end*, and it is too late then to open it up and bring in new parties, and grant relief against them. (Meadows vs. Goff, 90 Ky., 541; Brown vs. Vancleave, 86 Ky., 381.)

Plaintiffs then appealed to the Court of Appeals from the order refusing to allow this supplemental petition to be filed.

The Court of Appeals *affirmed* this judgment, or order, on April 4, 1896; and held that it was too late to bring a new party into the cause; but said in its opinion that if the facts stated in the amended petition were true the Louisville & Nashville Railroad Company was "*already a party* defendant and bound by the judgment"; and that the proper thing to do would be either to institute a separate suit against the Louisville & Nashville Railroad Company, setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against the Louisville & Nashville Railroad Company in this suit by a rule based upon an affidavit stating the facts set out in the amendment. (Abstract, 56–63; 99 Ky., 143–155.)

The Court's attention was immediately called to the fact that the only matter before it was as to the propriety of the order of the lower Court in refusing to allow the amendment to be filed, and that the question of what subsequent proceedings plaintiffs should take was not before the Court. Thereupon the Court, in a modified opinion, conceded that "the opinion *went too far* in stating that questions were decided which were not strictly before the Court upon the appeal," and that what was said, as noted above, should be treated as having been said only *arguendo*. (Abstract, 64; 99 Ky., 156.)

Upon the return of the cause to the lower Court plaintiffs

adopted the suggestion of the Court of Appeals; filed an *affidavit* practically repeating the statements of the amended petition (Rec., 262; Abstract, 23), and moved for a rule against the Louisville & Nashville Railroad Company to pay into Court the sum of $53,565.62, the amount fixed in the judgment against the Louisville, Cincinnati & Lexington Railway Company. (Rec., 259; Abstract, 22.)

The lower Court, however, treating the language of the opinion of the Court of Appeals, heretofore mentioned, as a suggestion and not an adjudication, declined to issue the rule; and in this connection delivered a written opinion giving its reasons for so doing, which, we submit, for lucid exposition of fundamental legal principles and learned review of authority, would do honor to any court. (Rec., 272; Abstract, 33.) It showed that the suit was solely against the Louisville, Cincinnati & Lexington Railway Company, the original party to the contract with plaintiffs; that the Louisville & Nashville Railroad Company was not made a party defendant; that no process had ever issued against it; nor had it ever entered its appearance; and that no judgment had ever been entered against it; and neither was it a *pendente lite* purchaser, for whatever it purchased of the Louisville, Cincinnati & Lexington Railway Company was years before this suit was brought, as shown by duly recorded conveyance; that if the Louisville & Nashville Railroad Company were in fact liable it might seem a hardship to have to institute an original suit against it; but that it was plaintiffs' own fault that he had never brought that party before the Court; that *the Court could not know what defenses it had;* but it was entitled to "its day in court." (Rec., 272; Abstract, 33.)

Accordingly, as said above, the Court declined to issue any rule against the Louisville & Nashville Railroad Company, or to treat it in any manner as a party to that cause.

On appeal to the Court of Appeals it adhered to the views it had expressed in its opinion heretofore mentioned, and held that the lower Court ought to have issued the rule as requested. (Abstract, 65; 44 S. W. Rep., 130.)

On return of the cause to the lower Court plaintiffs renewed their motion for a rule, and thereupon the Court issued a rule against the Louisville & Nashville Railroad Company to "show cause why it shall not be required to pay into Court the sum of $53,565.62, as shown by the report herein of R. E. Sewell, No. 2, together with interest . . . which principal and interest now amounts to the sum of $90,181.87." (Rec., 292; Abstract, 49.) Or, as subsequently expressed by the Court of Appeals, the Court "awarded a rule against the appellant company to show cause why it should not be compelled to pay into Court *the amount of the judgment rendered against the Louisville, Cincinnati & Lexington Railway Company.*" (Abstract 68; 47 S. W. Rep., 583.)

This was the first time in all the history of this litigation that any pretense of process had ever issued against the Louisville & Nashville Railroad Company; the first time it had ever been called upon to make answer or response to any one; and then the call was to *show cause why it should not pay a judgment for money which had been theretofore entered against some one else.*

Being thus called on for the first time in the litigation it filed a response, in which, among other things, it said:

First. "*That it is not a party to this suit. It has not "been named in any pleading in the case as a party, and "there is no averment made in any pleading in the case "against this respondent, or that is applicable to this "respondent, and no judgment or order has ever been "entered in this case against this respondent, and no pro- "cess has ever issued against or ever been served on this "respondent.*"

Second. "*There has never been a time from the insti-*
"*tution of this suit up to this time when this respondent*
"*could, with propriety, have filed an answer setting up its*
"*defenses against the alleged claim of the plaintiff, and to*
"*require it now to pay into Court upon this rule the amount*
"*stated in the rule, or any other amount, WOULD BE TO*
"*DEPRIVE THIS RESPONDENT OF ITS PROP-*
"*ERTY WITHOUT DUE PROCESS OF LAW,*
"*CONTRARY TO THE CONSTITUTION OF THE*
"*UNITED STATES IN SUCH CASES MADE*
"*AND PROVIDED.*

"If the plaintiff should be required, in the usual and
"orderly way, to institute a suit against this respondent
"to hold it liable for plaintiffs' alleged claim, this
"respondent has and could and would present good, valid
"and subsisting defenses thereto."

Third. The third paragraph of the response simply showed that if the judgment be considered a judgment against the Louisville & Nashville Railroad Company in favor of the bondholders, it should not be required to pay the full amount into Court because it held some of the bonds itself.

Fourth. The fourth paragraph showed that the Louisville & Nashville Railroad Company was not a *pendente lite* purchaser; and outlined what had been the manifest understanding and conduct of the case up to the time the Court of Appeals threw out the suggestion heretofore mentioned. The purpose of this outline was to show that it had never been the intention to sue the Louisville & Nashville Railroad Company, but only the Louisville, Cincinnati & Lexington Railway Company. It showed that the suit was instituted against the Louisville, Cincinnati & Lexington Railway Company alone, because it was the party

with whom plaintiffs had made their contract; though *plaintiffs knew, when they filed their suit, that the Louisville & Nashville Railroad Company was then the owner of the property which had been the railroad of the Louisville, Cincinnati & Lexington Railway Company;* though so far as concerned the assignment of the lease on the Northern Division of the Cumberland & Ohio, the latter had refused to consent to the assignment; and that plaintiffs instituted their suit against the Louisville, Cincinnati & Lexington Railway Company *on the contract*, believing that it could not avoid its liability by assigning the lease; it being the policy of plaintiffs first to get a judgment against the Louisville, Cincinnati & Lexington Railway Company, with whom they had the contract, and then, if they should fail to procure satisfaction of the judgment, sue the Louisville & Nashville Railroad Company and seek to hold it responsible. The response also showed that the *Louisville, Cincinnati & Lexington Railway Company was a distinct corporation and had continuously preserved its organization.* (Rec., 293; Abstract, 50.)

Upon the filing of this reponse plaintiffs moved to make the rule absolute, and the Court did so, entering a judgment in which, after making certain recitals as to the submission and filing of the opinion, etc., it proceeded as follows:

"And it is ordered and adjudged that the said response "to the said rule is *insufficient*, and the said rule is made "absolute, and the said Louisville & Nashville Railroad "Company is ordered to pay into Court *the amount of judg-* "*ment herein*, the said sum of $90,053.34, as of March 21, "1898, subject, however, to the following credit, viz.: . . .

"After allowing the credit aforesaid, the *balance due* "*upon said judgment* is the sum of $77,784.45, and the said "Louisville & Nashville Railroad Company is adjudged

"and ordered to pay the said sum into Court on the 7th "day of April, 1898.

"To the ruling of the Court in holding the response "insufficient, the Louisville & Nashville Railroad Com- "pany excepts." (Rec., 308.)

In entering this judgment the Circuit Court filed an opinion in which it again vigorously protested that this was *not due process of law*, but said it felt bound to adopt the views of the Court of Appeals, as expressed when it said the rule should issue. (Abstract, 52; Rec., 309.)

The Louisville & Nashville Railroad Company then appealed to the Court of Appeals from this judgment, where it was affirmed.

In view of the argument for defendant in error that this entire cause was simply a proceeding *in rem*, it is very instructive to note the view taken by the Court of Appeals at the conclusion of the cause as to the nature of the judgment entered. The Court itself, in a former opinion, had spoken of the proceeding as one *in rem*, and when its attention was called to this by appellant in resisting the application for damages on the supersedeas bond, such damages, by the Kentucky practice, being allowed only on *personal judgments* for money, the Court said:

"While this is true, yet the proceeding to compel the "payment of the fund into Court by the appellant company "is *essentially personal* against it, and a judgment, to be "enforced by rule, directing appellant to pay the amount "of the judgment into Court is, in our opinion, *essentially* "*a personal judgment, upon which the Court might have* "*ordered execution to issue.*" (Abstract, 69; 47 S. W. Rep., 583.)

It will be remembered that the only kind of judgment ever entered in the cause *against any one* was a judgment

ordering money to be paid into Court, and directing a rule to issue to compel its payment. And this was the character of judgment which the original petition prayed for. What therefore, the Court meant by saying that the *proceeding*, seeking such a judgment, was *essentially in rem*, but that the judgment, when thus obtained, was *essentially in personam*, we confess our inability to explain. But the important fact to be remembered is that the Court of Appeals has held in this case, in its *last opinion* therein, that such a judgment as was entered in this cause is "essentially a *personal* judgment, upon which the Court might have *ordered execution to issue.*" After the judgment of affirmance was entered, the writ of error from this Court was allowed.

ASSIGNMENT OF ERRORS.

The formal assignment of errors will be found in the record at page 322, and in the abstract of record at page 55. The effect of the assignment, however, is simply this, that

> In issuing and making absolute, a rule against the Louisville & Nashville Railroad Company to pay a personal judgment for money theretofore entered against another person, in which judgment the Louisville & Nashville Railroad Company was not even mentioned, and in a cause to which it was not even a party, that corporation is deprived of its property without due process of law, or at least will be so deprived if the judgment is enforced; and that this is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

I.

In briefing a motion made at a former term to affirm the judgment herein as in a delay case, counsel said "the question which plaintiff in error attempts to raise has long been so conclusively settled against its contention that it is no longer open for argument"; and thereupon they proceeded to cite and comment on the authorities relied on by them and by the Court of Appeals of Kentucky to justify the course taken by them in this action.

Before stating our own views and authorities upon this matter, we think it well to examine the authorities which are said to have "conclusively settled" the question presented; for of course if the proceeding complained of is according to established precedents in the law, it is idle to contend that it is not "due process of law." We have read with care every case cited by the Court of Appeals, or by counsel for defendant in error in their elaborate briefs heretofore filed; in addition to which we have conducted an independent research; and we believe it can be truly said that the case at bar, so far as relates to the proceedings against the Louisville & Nashville Railroad Company, is absolutely *unique in jurisprudence.*

Not one single authority, whether text-book or judicial decision, has been found to show that, in all the history of English or American *jurisprudence*, a simple judgment for money *against one person* has ever been enforced as if it were a judgment for money *against an entirely different person*, who was *not named in the judgment, nor even shown by the record to be a party to the cause.* YET THAT IS WHAT WAS DONE IN THIS CASE.

Many cases can be found where a judgment has been held to be binding *as conclusive evidence on certain points* against one who was not a party to the record of the cause wherein it was entered; and again, judgments involving the disposition of specific property have been enforced by rule against *pendente lite* purchasers. But those cases are far different from this one.

Thus Lovejoy vs. Murray, 3 Wall., 1, is strongly relied on by counsel for defendant in error, and is as strong and as pertinent as any case they cite. And no case could better illustrate what is the really true principle involved in these cases, and the false application of it in the case at bar. There property had been taken by a sheriff under an attachment. A stranger claimed it. Plaintiff gave the sheriff an indemnifying bond; whereupon the sheriff sold the property. The stranger sued the sheriff in trespass; the sheriff gave his indemnitor notice; the latter employed counsel and took charge of the defense. Plaintiff recovered a judgment for damages against the sheriff; of which, however, he only received partial satisfaction. He desired then to proceed against this indemnitor. *But how did he proceed?* He could not in that case have proceeded by execution or rule, because the indemnitor was a non-resident. He had to go to his State to reach his property. But how did he proceed there? He did not treat the indemnitor as a party defendant to the judgment, and simply sue *on the judgment;* but he sued him *in trespass*, exactly as he had done the sheriff. This Court held that in this action of trespass the plaintiff had three points to establish, viz., (1) his title to the goods taken, (2) their value, and (3) the participation of the defendant in the conversion or trespass. And the Court further held that the first and second points were proved by the record of the action against the sheriff, and the last point was proved by the production of the indemnifying bond. This was very far from treating

the judgment as a money judgment against the indemnitor. It left the latter *free to set up any defense he might have* against this claim of personal liability, and simply made the judgment conclusive on the two points mentioned.

Elliott vs. Hayden, 104 Mass., 1.0, from which counsel also quote, is very much like the case just cited, except it is a State Court case, and all the proceedings occurred in the same State. Plaintiff, a claimant of property, recovered judgment against an attaching officer in an action for *conversion.* An indemnifying bond had been given the officer. Plaintiff desired to pursue the indemnitor. If such a doctrine as is now advocated had then ever been heard of in Massachusetts, plaintiff would have filed an affidavit and asked for an order directing either an execution or a rule to pay against the indemnitor. But he did neither. He sued him *in conversion*, as he had done the officer (thus giving him an opportunity to set up any defense he might have), and simply offered his judgment in *evidence on certain points.*

Cases like these have long been familiar to the profession. Is it not then most remarkable that never before the present case was such process as was pursued here ever adopted in any court of justice?

Strong reliance is also placed on Eagle Mfg. Co. vs. Bradley Mfg. Co., 50 Fed. Rep., 193; from which an extensive quotation is made in the brief. Plaintiff first sued David Bradley & Co., who were selling certain patented articles, for an infringement of its patent. It asked an injunction and an accounting, and got both; the main question being the *validity of plaintiff's patent.* (35 Fed. Rep., 295.) It then sued the Bradley Mfg. Co., a manufacturing concern of which the defendants in the former suit constituted a branch, and sought to enjoin it from manufacturing these articles. It showed that in the first suit the defendant in the second suit

had practically conducted the defense, and that the main point decided was the validity of plaintiff's patent. The Court, therefore, simply held in the second suit that this *question of validity* could not be relitigated. In the first case there seems to have been a decree for an accounting, but there was no attempt to collect this out of the defendant in the second case.

Bennett vs. Star Mining Co., 119 Ill., 9, involved simply the question of the validity of a mechanic's lien on real estate. There was no question of personal liability in the case. After the mechanic had brought suit to enforce his lien, and after process had been served on one of the parties in interest, but not on another, a third party bought the property. He came into the litigation, employed counsel and contested the validity of the lien under the names of the parties to the record. In subsequent litigation involving simply the question of the validity of this mechanic's lien, the Court held that this party was bound by the former adjudication *on that question.*

Daskam vs. Ullman, 74 Wis., 474, was a case where an assignee of a note sued the maker. The maker answered that the note had been paid to the assignor before the assignment. The assignor was notified of this defense, and assisted the plaintiff in endeavoring to disprove the plea of payment. Judgment, however, went for the defendant on this issue, and when the assignee subsequently sued the assignor to recover the amount of the note, the Court held that the former adjudication *on the question of payment* was conclusive.

In Palmer vs. Hays, 112 Ind., 289, a party sued under a statute of Indiana to have satisfaction entered of a judgment that had formerly been entered against him, which he claimed had been satisfied. It was shown on the trial that this judgment had once been replevied, and that the replevin

bail had brought a suit exactly similar to the present one to have satisfaction entered of that judgment, and that the plaintiff in the present case had really taken charge of that litigation on behalf of the bail, but had been defeated therein on the question of satisfaction. Accordingly the Court held in the second case that the former adjudication was conclusive *on this question.*

Coats vs. Roberts, 4 Rawle, 112, was a case where a party had been garnisheed to pay money. He denied that he owed the money to the debtor in the action, but insisted that the debtor had previously assigned the claim on him to a third party, of which he had been notified. And this third party took part in that trial and endeavored to show that he and not the debtor in the action, was the owner of the claim. The Court, however, decided against this contention, and compelled the garnishee to pay the money to the plaintiff in that attachment proceeding. Subsequently this third party, who had claimed to be the assignee of this debt, sued this garnishee to recover the debt, but the Court held that the judgment against the garnishee, under the circumstances heretofore explained, was conclusive evidence in his favor on the question of ownership of the claim, and that he could not be compelled to pay the money twice.

In Van Knoughnet vs. Denny, 68 Hun., 179, a party sued for money loaned and services rendered. His wife took an active part in the prosecution of the suit, and actually furnished the itemized account called for by the defendant, and testified in the case, etc., etc. The plaintiff established his claim as sued for, but defendant established a counter-claim for a larger amount, which was allowed, and judgment was given over for the balance. Subsequently the wife sued this same defendant for certain items of the account included in the previous suit, claiming that they were really due to

her and not to the husband. Of course the Court held that it would be a fraud to permit her to maintain such a claim, after having assisted her husband in establishing the claim on those same items against this defendant, and after he had actually received satisfaction thereof by the allowance of a credit on the defendant's counter-claim.

Stoddard vs. Thompson, 31 Ia., 80, was a case where Thompson sued on a note. Defendant pleaded that Thompson was not the owner of the note, but that one Stoddard was the owner. Stoddard had notice of the suit, and took part in the defense, and tried to establish his ownership. Judgment, however, went in favor of Thompson. Stoddard then sued to enjoin Thompson from collecting this judgment on the ground that Stoddard and not Thompson was the real owner of the note. The Court simply held that the record in the former case was conclusive evidence in the second case on the question of the *title to the note.*

Louisville & Nashville Railroad Company vs. Hall, 12 Bush, 131, and Heckman vs. Louisville & Nashville Railroad Company, 85 Ky., 638, cited by the Court of Appeals in its opinion, were simply cases of *misnomer*, where the defendant intended to be sued was simply sued by the wrong name, and where every allegation made in the petition could have been truly made against the real defendant under its proper name. But, of course, the case at bar is a wholly different case from that. Plaintiffs alleged in their petition that the Louisville, Cincinnati & Lexington Railway Company made the several contracts sued on, *which was true;* and they manifestly intended to sue this company, which was the *maker of these contracts.* They did not mean to sue the *subsequent purchaser* of the property to which the contracts related. Nor did they connect the purchaser in any way with the transactions, nor make a single averment against it, but

all of the averments were exclusively and appropriately against the contracting defendant. Hence, there was manifestly no case of misnomer.

Estell vs. Peacock, 44 Mich., 471 (also cited by the Court of Appeals), was where a party sued on a note given for logs. Defendant pleaded failure of consideration because the title to the logs was not in the plaintiff, but in a third party; and the third party undertook to establish this defense and to prove title in himself. The Court simply held that if this should be done, and judgment should be given on this issue, it would be conclusive on the question of the *title to the logs* in any subsequent litigation between the plaintiff in that suit and this outside party.

Marsh vs. Smith, 73 Ia., 295, Linton vs. Harris, 78 Ga., 265, Lyon vs. Stanford, 42 N. J. Eq., 411 (15 Stewart), Landis vs. Hamilton, 77 Mo., 555, and Valentine vs. Mahoney, 37 Cal., 398, each involved simply a question of *title to land.* In each of them where the question of title to a particular piece of land was presented for decision, the Court simply held that some adjudication in a former suit wherein that identical question was decided, and in which the parties to the second suit had been heard on that question, was conclusive on that one point of the *title to the land.*

We have thus at some length examined every case referred to by either Court or counsel in the action at bar to show that the question involved in the present case is "conclusively settled," except a few cases cited merely by their titles, with the statement that they are "cumulative on the same point"; and we now repeat the statement that no case has been found, or can be found, where a *judgment for money against one person* has been treated as a *judgment for money against an intirely different person.* But, on the contrary, while in some of the very cases cited by counsel for defendant (such as Lovejoy vs. Murray, 3 Wall., and Elliott vs.

Hayden, 104 Mass.) such process as that now contended for might have been, and doubtless would have been, used and applied, if it were known to the law, yet this was not done, but an independent suit was brought, in which full *opportunity* was allowed for *any character of defense that might be offered*, whether by way of traverse or confession and avoidance, whether by plea of limitation or accord and satisfaction, or estoppel of any kind, or any character of defense known to the law, and in which cases the former adjudication between different parties was simply used as *conclusive evidence on certain points therein adjudicated.*

II.

We think the foregoing review of the authorities relied on by defendant in error shows that they furnish absolutely no support for *the proceeding adopted in the case at bar*, which was wholly different from any attempted in any of those cases.

On the other hand, however, we do find that the theory of defendant in error was once, and only once before, so far as we can find, advanced and sought to be enforced ; but was promptly rejected as having no foundation in the law of the land.

We refer to the case of Bidwell vs. Toledo Consolidated Street Railway Company, 72 Fed. Rep., 10. In this case suit had been brought by plaintiff against the Toledo Consolidated Street Railway Company for an alleged infringement of a patent. After the cause had progressed to a considerable extent, including the making up of the issues and the taking of proof, the complainant made an application for leave to amend its bill and make the General Electric Company, which was a non-resident, a party defendant to the cause.

The grounds upon which this application was based and the reason for refusing it are so clearly stated in the opinion of Judge Ricks, and seem to be so directly applicable in principle to the case at bar, that we shall quote quite freely from the opinion. The Court said:

"The complainants have made application to this Court "for leave to amend their bill by making the General "Electric Company, a non-resident corporation, a party "defendant to this suit. It is not claimed that said pro- "posed defendant is within the jurisdiction of the Court "and amenable to its process, or that it can be brought in "by original subpœna. It is sought to hold it *as a defend-* "*ant in this case* because it is alleged the counsel who are "preparing and conducting the defense for the Toledo "Consolidated Street Railway Company are the general "counsel for said proposed defendant. It is further con- "tended that because said counsel have so assumed the "defense of this case; have furnished witnesses in the em- "ploy of the General Electric Company to testify on "behalf of the defendant; that such witnesses, while so "testifying, have been under salary from the General Elec- "tric Company; and that the latter has in fact agreed to "protect the said The Toledo Consolidated Street Railway "Company in the use of the appliances which it is claimed "are an infringement of complainants' patent, and that it "will conduct any defense which the said Railway Com- "pany may be called upon to make in Court by reason of "the use of such appliances—*that by such conduct it has,* "*in legal effect, entered its appearance in the suit.*

"The Court passed upon an application of a somewhat "similar character made in this case some time ago. From "a statement of the facts as above stated, it will be observed "that the Court is now asked to declare that the General "Electric Company, by assuming the defense of this suit,

"as alleged, on behalf of the Toledo Consolidated Street "Railway Company has in fact entered its general appear- "ance, and *made itself a defendant in this case*, and is to "be bound by the decree, if one should be made in favor "of the complainants and against the defendant. It is not "claimed that there was any intention on the part of the "General Electric Company to become a party to this case, "or that there is any such desire on its part. It is sought "to make the decree in this case binding upon that cor- "poration because of the acts before stated.

"Is it possible for a Court to make any orders in this "case, under these facts, which would make said corpora- "tion a party defendant in this suit against its wish? "Counsel insist that the Court has authority to make such "an order, and it should be made to promote justice. It "is urgently contended that the plaintiff is now in fact "prosecuting this case against both the Toledo Consolidated "Street Railway Company and the General Electric Com- "pany: that the latter is giving to its vendee and the user "of its electrical appliances the benefit of its great corpo- "rate wealth and influence, and the benefit of the experience "and ability of its counsel; and that if as the result in "such a contest the complainants should prevail, they "should have the benefit of their victory by securing a "decree which would be binding and conclusive upon the "General Electric Company in any subsequent litigation "that may occur between the parties."

The Court then proceeds to refer to a case which had been cited as authority for such a proceeding, and which case had in terms cited Lovejoy vs. Murray, 3 Wall., 1, and Robbins vs. City of Chicago, 4 Wall., 657, and then said:

"These are the cases relied upon by Judge Shiras to "support his decree in the case cited by complainants'

"counsel. They could not have been cited as authority to "support the construction which counsel in this case now "seek to put upon the decision made by Judge Shiras in "the case to which reference has been made. As before "stated, Mast & Co. were not made parties to the suit before "Judge Shiras, and the decree did not undertake to *bind* "*them as a party defendant*, but simply undertook to show "such a state of facts as would tend to estop them in sub- "sequent litigation from again controverting *the issues* "*made in the suit of which they had notice* and in which "they were interested, and in which they participated in "the manner stated.

"It may be that on the final hearing of this case, the "evidence may disclose such conduct on the part of the "General Electric Company—such a participation in the "actual defense of this suit—as will justify the Court in "making a statement of such facts on the face of the "decree, to the end that, in subsequent litigation involving "the same issues or the same interests, the complainants "may have a right to contend that the General Electric "Company is estopped from further defending against the "same. That is as far as the Court went in the case cited "in 41 Federal, 351. . . .

"I am, therefore, of the opinion that as the General "Electric Company is a non-resident corporation, and can "not be brought into this Court by original subpœna, leave "can not be given to amend the bill to make it a party "against its will by reason of the facts hereinbefore "stated. . . .

"The question of whether it has so identified itself "with this case as that it may be hereafter estopped in "subsequent litigation from again defending as to the "issues or interest now involved is a question, as I have "before said, which can only be passed upon at the final "hearing and in the final decree. This is certainly as far

"as the Court under any circumstances would have author-
"ity to act. I can find no authority for the proposition
"that by such action as the General Electric Company has
"taken with reference to this case, as hereinbefore stated,
"it has made itself (being a non-resident corporation),
"against its own intention and wish, *a party defendant in*
"*this case*, and thereby conferred upon the Court authority
"to make a decree binding and conclusive upon it *as a*
"*party defendant.* It may have put itself in a position to
"estop it in subsequent litigation as heretofore stated. It
"will be proper to determine that question when it arises."

It is true that in the case just cited the General Electric Company was a non-resident, but that was not a material fact, if the principle contended for be true, because a non-resident may voluntarily enter its appearance and *make itself a party* to a cause (if such a thing were in any event possible), just as easily as can a resident. And this suggests a question put in his written opinion by the learned judge who decided the case at bar in the first instance in the State Court. He said:

"In the case at bar let us suppose that the Louisville
"& Nashville Railroad Company had its habitat in
"another State—say in the State of Tennessee, instead of
"Kentucky—would the judgment against the Louisville,
"Cincinnati & Lexington Railroad Company be binding
"upon it, and could a suit upon a certified copy of the
"record in which its name nowhere appears be maintained
"against it in any other State or Federal Court?"
(Abstract, 44; Rec., 284.)

We cannot believe this question can be answered in the affirmative. Possibly an original suit might be brought in Tennessee, in which the record in the case at bar could be

used as evidence against the Louisville & Nashville Railroad Company, on certain points therein adjudicated, as was done in Lovejoy vs. Murray, 3 Wall., 18, and in Elliott vs. Hayden, 104 Mass., 180, heretofore cited; but that an *an action on the judgment* could be maintained against the Louisville & Nashville Railroad Company as a *party defendant to that judgment*, we cannot believe possible.

III.

The result of the particular line of cases we have been considering is, we think, very clearly stated by Judge Ricks in the case last cited, viz.: that a person may, by taking part in litigation to which he is not a party, estop himself under certain circumstances from denying the matters *adjudged therein;* but he does not thereby make himself a *party to the cause*, or authorize the court to enter a judgment therein against him personally as *a party defendant. These two things are very widely different from each other in legal effect;* and it is this difference which the Court of Appeals and defendant in error have completely overlooked in reaching the conclusion that the procedure adopted in the case at bar is according to established precedent, and is therefore due process of law.

Thus if suit be brought against such a party, as we have supposed, and he makes defense on points which were involved and decided in the former litigation, that former adjudication may be conclusive upon him *on those points;* but *he may have other defenses*, based upon *matters personal to him*, which were not and could not have been litigated in the former suit, and he, at least, has a *right to be heard* as to whether he has or not. But if he is held as a party defendant to the former judgment, *all defenses are cut off.*

A very clear illustration of this may be supposed in the case of a surety upon a note. Suppose the payee, believing the maker abundantly solvent, and not caring to bother with the surety, sues *the maker alone.* The surety, however, hears of the suit, and may know that as a matter of fact the maker is insolvent, and that at some time an attempt will probably be made to collect the debt off of him (the surety.) He, therefore, takes naturally a very lively interest in the suit. The defendant (principal) may plead *non est factum*, or no consideration, or a vicious consideration. The surety knows that if any of these defenses shall prevail it will certainly release him. He, therefore, seeks to establish them, may possibly testify in support of them, and practically takes charge of the defense. But judgment goes for plaintiff against the principal. Execution is returned "no property found." He then sues the surety. The surety pleads (1) *non est factum* as to the principal; (2) *non est factum* as to himself; (3) vicious consideration; (4) some matter of estoppel between himself and the payee; (5) limitation. Now, upon the *first* and *third* points, possibly the former adjudication might bind the surety, but surely he would not be thereby precluded from making his *second*, *fourth* and *fifth* points. Yet, if that judgment is treated as a judgment against him personally, *all his defenses* are thereby cut off. The foregoing is merely a simple *illustration of the difference* between holding a judgment to be conclusive *evidence of certain facts* against a person, and holding it to be a judgment against him as *a defendant in the judgment.*

Neither can it ever be assumed that the person could not possibly have any other defense against his personal liability than such as was made in the action already tried. *He has a right to be heard on this question.* It can not be presumed that he has *no defense;* nor can it be *prescribed what his*

defenses may be; though it may be known that as to *certain defenses* he is *concluded.*

The case of Rees vs. Watertown, 19 Wall., 107, is very suggestive and instructive in this immediate connection. Rees was the holder of bonds issued by the City of Watertown. He brought suit against the City and obtained judgment and a return of "no property found." He then brought suit for mandamus to compel the levy of a tax to pay the judgment. He had three writs of mandamus issued; but each of them was evaded by resignation of the officials of the town. The matter was necessarily one of great publicity. Every one knew of it. Rees then brought suit in equity against the City, showing these facts, and insisting that the corporate authorities were trustees for creditors; that the property of the citizens was a trust fund to pay the debts of the City; and asking that the Court enter a decree subjecting *the individual property of the citizens;* that it direct the marshal to report the property to the Court "*where any objections should be heard;*" that the amount of the debt be apportioned among the several owners of property; and that the marshal be then directed to collect these several amounts, or in default of payment sell the property. The Court refused the relief sought, and said that to grant it would be *to take property without due process of law.* In the course of its opinion it said:

> "Due process of law undoubtedly means in the due "course of legal proceedings, according to those rules and "forms which have been established for the protection of "private rights. . . . *Whether in fact the individual has* "*a defense to the debt, or by way of exemption, or is with-*"*out defense, is not important. To assume that he has* "*none, and, therefore, that he is entitled to no day in court,* "*is to assume against him the very point he may wish to* "*contest.*" (Pages 122, 123.)

IV.

Now let us recall what was done in the case at bar. As we have already noted, there was no claim of a lien upon any tangible property, and no attempt by either an attachment or a receiver to get control of any specific fund. The prayer in the petition that defendant be required to pay into Court the earnings, upon which a lien was claimed, was simply a prayer for *final decree to that effect*, not an attempt to have the receipts from the property paid into Court from month to month during the litigation, and no attempt was ever made to have such a thing done. Pending the litigation the possession of the property was left undisturbed, with the right in the possessor to collect and use the earnings thereof. Furthermore the Louisville & Nashville Railroad Company was then the owner and in possession of the property, as plaintiff knew, and yet it was not even made a party, nor any allegation made as to any kind of demand having been made upon it. It was not mentioned in the petition, but even if it had been, no relief was prayed against it, and therefore if the judgment of 1894 had expressly ordered the Louisville & Nashville Railroad Company to pay this money, it would, by the settled law of Kentucky, have been void. (Allsmiller vs. Freuchtenicht, 86 Ky., 205.) Plaintiffs simply trusted to the *personal ability of the defendant* to respond at the end of the litigation to any judgment that might be entered ordering it to *pay money*.

And when the judgment was entered it was simply an order that the Louisville, Cincinnati & Lexington Railway Company pay money into Court. It recited that the Commissioner's report showed $60,192.27 of earnings, but that defendant was entitled to a credit of $6,626.05, and therefore ordered that "the balance of $53,562.62" be paid into Court.

It is true of course that this was the amount of "earnings" which the Court held that defendant, the Louisville, Cincinnati & Lexington Railway Company, had received; and its liability to pay this amount into Court grew out of this fact; yet the thing ordered to be paid into Court was simply *money*, the amount of a balance of an account beginning back in 1882, twelve years before this order was made and three years before even the suit was begun; and in fact the account made by this report *closed in 1890*, four years before this order was made. The money which had from time to time during all these years from 1882 to 1890 been received from the operation of the road, or from carrying any specific freight or passengers, had no earmarks; and if any part of it was on hand in 1890, when the account in the report closed, even that was, of course, not on hand in 1894, when the order to pay was entered.

In other words, it was simply a *judgment for money*, operating purely *in personam;* and its enforcement was attempted in what was originally the sole means of enforcing such decrees in equity, viz., by rule or other process of contempt.

In Daniell's Chancery Pleading and Practice (5th ed., Vol. 2, Ch. 26, Sec. VI, side page 1032), the author says:

> "'Formerly a decree in a court of equity, unless it was "'for land, operated only *in personam;* and the only "'method of enforcing it was by what is termed process of "'contempt, against the party disobeying it.'"

And again (Sec. VII, side page 1042):

> "'All decrees and orders may, as we have seen, be "'enforced by process of contempt. Such as direct pay- "'ment of a sum of money or costs may *also* be enforced

"'under the act considered in the last section, by writs of "'*fieri facias* and *elegit*.'"

In Kentucky it is provided by statute that:

"A final order or judgment for money, lands or other "specific things, may be enforced by any appropriate "writ of execution *allowable on a judgment at law*, "according to the nature of the case.

"Such writs shall issue and be returnable as other "writs of execution.

"*Nothing in this article shall prevent any party from "proceeding to carry an order or judgment of Court into "execution according to the ancient practice of Courts of "Chancery.*" (Ky. Statutes, Sec. 1663.)

Accordingly, after the judgment was entered for the payment of this money, the Court proceeded, as it had the right to do, to endeavor to enforce it by a rule to pay. And it might, if it had seen fit, have ordered an execution of *fieri facias* (which only issues on judgments *in personam*) to issue upon it. If it could possibly need any authority to establish such a proposition, the last opinion delivered by the Court of Appeals in the case at bar furnishes it; for the Court there says: "A judgment to be enforced by rule, directing appellant to pay the amount of the judgment into Court, is, in our opinion, *essentially a personal judgment, upon which the Court might have ordered execution to issue.*" It is true the Court is here speaking of the order directing the Louisville & Nashville Railroad Company to pay the money into Court; but surely, if an order directing the Louisville & Nashville Railroad Company to pay the money into Court was "essentially a personal judgment,"

then the order directing the Louisville, Cincinnati & Lexington Railway Company to pay the same into Court was likewise "essentially a personal judgment."

The case then comes to this, as we have said before, a judgment which is "essentially a personal judgment" against the Louisville, Cincinnati & Lexington Railway Company, the sole defendant in the cause, is enforced by rule—the ancient chancery mode of enforcing personal judgments—as a personal judgment against a totally different person, who is not even a party to the record. It is not used merely as conclusive evidence against him on the points therein adjudicated, but is to be enforced by rule to pay, as if it were itself a personal judgment against him, *thus cutting off all defenses.*

V.

Just at this point it is well to see what rule the Court of Appeals lays down by which it is to be determined whether or not the Louisville & Nashville Railroad Company is a party defendant to this judgment, inasmuch as it is not named in it nor shown by the record to be a party to it.

We find that the Court settles this question in its opinion by very specific language. In reversing the judgment of the lower Court, which had refused to issue the rule against the Louisville & Nashville Railroad Company, the Court of Appeals said:

> "If the Louisville & Nashville Railroad Company is a "party to this suit, it is so because it has, as assignee of "the contract and owner of the property of the Louisville, "Cincinnati & Lexington Railway Company, obtained the "net earnings and conducted the defense of this suit, and "the truth of these averments can be ascertained upon rule "and response." (Abstract, 66; 44 S. W. Rep., 130.)

Thus the Court in its opinion clearly and specifically laid down the scope of the inquiry to be had in determining whether or not the Louisville & Nashville Railroad Company was subject to the jurisdiction of the Court and a party to the action and the judgment therein. There were but three matters to be inquired into, viz.: (1) Is the Louisville & Nashville Railroad Company the assignee of the lease and the owner of the property of the Louisville, Cincinnati & Lexington Railway Company? (2) Did it obtain the net earnings of that property? and (3) Did it conduct the defense of this suit? These three, and *these three questions only*, were to be the subject of inquiry; and if they should be answered in the affirmative, then the Louisville & Nashville Railroad Company was to be considered "*a party to this suit*" and concluded in every respect by the judgment therein, as much so as if named in it, and *therefore precluded from making any defense which it might have*, and which possibly the Louisville, Cincinnati & Lexington Railway Company did not have or did not assert.

The Court recognizes that merely defending the suit could not make the Louisville & Nashville Railroad Company a defendant and give the Court *jurisdiction over it;* but it says that if, in addition to this, it "*obtained the net earnings*"—a fact having no connection at all with the Court proceedings, and one to be determined by extraneous investigation subsequent to the judgment—then it was *a party to the suit* and the Court had *jurisdiction over it.* But if, on investigation it shall turn out, that it *did not obtain the net earnings*, then it is *not a party* to the suit, and the Court *did not have jurisdiction over it.* To our minds this proposition is legally and logically incomprehensible. We can understand how the receipt or non-receipt of such net earnings has a most material bearing on the original question of the

liability or non-liability of the company to plaintiffs' demand; but what bearing such question of receipt or non-receipt of net earnings of a railroad can have on the question of whether or not the company is *a party to this suit* is to us absolutely incomprehensible.

But that no such extraneous inquiry, to be conducted after a cause had been tried and a judgment rendered, can determine the jurisdiction of a Court over a person, has been absolutely settled by this Court in Pennoyer vs. Neff (95 U. S., 714.) There a non-resident defendant had been proceeded against merely by *constructive service* of process, and a personal judgment for money had been given against him under express authority of a State statute. On this judgment execution issued and was levied on his land in the State. It was sold, and the purchaser put into possession. The party thus proceeded against then returned and sued the purchaser in ejectment to recover his land. The purchaser, of course, defended under the proceedings mentioned, and argued that they should be held valid, because, while the defendant was not personally before the Court, yet it was manifest from subsequent developments that he had *land* in the State, and that as the statute might have authorized, and in fact did authorize, such land to be seized under attachment *at the beginning* of the action, although on constructive service of process only, there was no substantial reason why a judgment personal in form might not be entered and execution issued, and, if land was found to be levied on, then be treated as held under a valid seizure—that this was a mere "question of procedure," and, as the statute authorized it, it should be upheld. This reasoning was quite plausible; and in fact it captured one member of the Court, Mr. Justice Hunt; but all the other members, speaking through Mr. Justice Field, said:

"But the answer to this position has already been "given in the statement that the jurisdiction of the Court "to inquire into and determine his obligations at all is "only incidental to its jurisdiction over the property. *Its "jurisdiction in that respect can not be made to depend upon "facts to be ascertained after it has tried the cause and ren- "dered the judgment.* If the judgment be previously "void, it will not become valid by the subsequent discov- "ery of property of the defendant, or by his subsequent "acquisition of it. The judgment, if void when rendered, "will always remain void; *it can not occupy the doubtful "position of being valid if property be found, and void if "there be none. . . . This doctrine would introduce a "new element of uncertainty in judicial proceedings.*" (Page 728.)

So in the case at bar we say that the question of whether or not the Court had jurisdiction in 1894 to render a judgment against the Louisville & Nashville Railroad Company —which, by the way, it did not even purport to do—can not be made to depend upon facts *inquired into four years afterward*, viz., as to whether it did or did not receive certain net earnings of a railroad. If the Court did not *intend* it to be, and did not make it, a judgment against the Louisville & Nashville Railroad Company, *when it was rendered*, it could not be made such four years afterward upon allegation or determination of facts not appearing when the judgment was rendered.

It must be remembered that the proceedings had upon the rule against the Louisville & Nashville Railroad Company in 1898 were not for the purpose of entering a judgment against it upon facts which might thus appear, but was simply for the purpose of ascertaining whether or not it was *already* a party to the action and *already* bound by the judg-

ment *theretofore entered* in 1894, and, if so, then of enforcing the judgment. For the Court held that if the company was not *already* in, it was too late then to bring it into the case, after final judgment therein had been entered. (Abstract 63; 99 Ky., 155.) But such an inquiry as was thus directed is precisely such as this Court in Pennoyer vs. Neff says can not be had, the Court saying: "This doctrine would introduce a new element of uncertainty in judicial proceedings."

We may concede for the purpose of argument, and as not necessary now to be determined, that the conduct of the Louisville & Nashville Railroad Company in connection with this suit prior to the rendition of the judgment of 1894 against the Louisville, Cincinnati & Lexington Railway Company, may have been such that, if it should be sued by plaintiffs, that judgment would be *conclusive evidence against it on certain points adjudicated therein*, as, for example, on the question so bitterly contested, as to whether the contract covered the earnings on business going both ways or only one way, and on the question of the amount of such earnings. But we do most confidently submit that the Louisville & Nashville Railroad Company *was not in 1894 a party to this cause;* that the Court did not have jurisdiction to render a judgment ordering it to pay money into Court; that the Court did not know it was doing so, that it did not purport to do so, and did not in fact do so; and that the judgment of 1894 is *therefore not a judgment against the Louisville & Nashville Railroad Company, and can not be enforced as such.* And with equal confidence we submit that the Court can not presume, conclusively or otherwise, that if the Louisville & Nashville Railroad Company should be sued by plaintiffs on their demand, it would or could have no defense, or no defense other than those points adjudicated in this suit against the Louisville, Cincinnati & Lexington Railway

Company. As to whether or not it has such defense or defenses, is, in the language of this Court in Rees vs. Watertown, "*not important. To assume that he has none, and therefore that he is entitled to no day in Court, is to assume against him the very point he may wish to contest.*" We may, however, briefly suggest that it may desire to be heard on the question of whether or not *any demand* was ever made *upon it* for these earnings, and, if not, then as to whether it is liable for them to the trustee, as no receiver was ever appointed to collect them. (Freedman Savings Company vs. Sheppard, 127 U. S., 494, 502, and cases there cited.) Or it may desire to be heard on some question of estoppel applicable to it. All these questions, however, are foreclosed, if the judgment of 1894 is to be held a judgment *against it*, simply because it received the earnings, and took part in the defense of this suit.

We, therefore, submit that by the action of the Court (if allowed to stand), in treating the judgment in this cause as a judgment against the Louisville & Nashville Railroad Company, and ordering it to pay the same, it will be deprived of its property without due process of law.

VI.

What is meant by this "due process of law" which is guaranteed by the Federal Constitution can not be defined with precision, nor measured with an iron rule. The subject is too broad and too vastly important for such an attempt. But this Court has often shed much light on the subject, and has said that some proceedings are, and that others are not, "due process of law." One thing we know is that the right thus guaranteed is something substantial; that it is not "too vague and indefinite to operate as a practical restraint."

(Hurtado vs. California, 110 U. S., 535.) And another thing we know is that due process of law is not just anything which a court, a legislature or an executive officer may choose to declare such. (C., B. & Q. R. Co. vs. Chicago, 166 U. S., 235.)

One principle which we believe will be found to run through all descriptions or definitions of "due process of law" is that it must at least be some "established" process, not something erratic, sporadic or unique, but something general, uniform and fixed. The very idea of *law* itself involves the conception of "a *rule*, not a transient, sudden order from a superior to a particular person, but something permanent, uniform and universal." Moreover it involves the idea of "a rule *prescribed*," that the people who are to be controlled by it may be notified of it. "But the manner in which this notification is to be made is a matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, as is the case of the common law of England. It may be . . . by writing, printing, or the like, which is the general course taken with all our acts of Parliament." (1 Blackstone, 44–46.) And it is this conception of law that enters into the definitions or descriptions of "due process of *law*" which this Court has given, as applied to judicial proceedings.

Thus in Rees vs. Watertown (19 Wall., 107–122), the Court said:

> "Due process of law, it is said, undoubtedly means in "the due course of legal proceedings, according to those "rules and forms which have been *established* for the pro- "tection of private rights."

In Bank of Columbia vs. Oakley, 4 Wheat., 235–244, the Court said:

"They" (the words, due process of law) "were intended "to secure the individual from the arbitrary exercise of "the powers of government, unrestrained by the *estab-* "*lished* principles of private right and distributive justice."

In Hurtado vs. California, 110 U. S. 535, the Court said:

"Law is something more than mere will exerted as an "act of power. It must be not a special rule for a par- "ticular person or a particular case, but . . . the general "law . . . so that every citizen shall hold his life, liberty, "property and immunities under the protection of the "general rules which govern society."

In the late case of Holden vs. Hardy, 169 U. S., 366–390, this Court, through Mr. Justice Brown, said:

"What shall constitute due process of law was perhaps "as well stated by Mr. Justice Curtis in Murray's Lessee "vs. Hoboken Land Co., 18 Howard, 272–276, as anywhere. "He said: 'The Constitution contains no description of "'those processes which it was intended to allow or for- "'bid. It does not even declare what principles are to be "'applied to ascertain whether it be due process. It is "'manifest that it was not left to the legislative power to "'enact any process which might be devised. The article "'is a restraint on the legislative as well as on the execu- "'tive and judicial powers of the government, and can "'not be so construed as to leave Congress free to make "'any process due process of law by its mere will. To "'what principles then are we to resort to ascertain whether "'this process, enacted by Congress, is due process? To

"'this the answer must be twofold; we must examine the "'Constitution itself to see whether this process be in con- "'flict with any of its provisions. If not found to be so, "'we must look to those settled usages and modes of "'proceeding existing in the common and statute law of "'England, before the immigration of our ancestors, and "'which are shown not to have been unsuited to their "'civil and political condition by having been acted on by "'them after the settlement of this country.'"

In Pennoyer vs. Neff, 95 U. S., 714–733, in speaking of due process of law, the Court said:

"Whatever difficulty may be experienced in giving to "those terms a definition which will embrace every possi- "ble exertion of power affecting private rights, and exclude "such as is forbidden, there can be no doubt of their "meaning when applied to judicial proceedings. *They* "*then mean a course of legal proceedings according to those* "*rules and principles which have been ESTABLISHED* "*in our system of jurisprudence for the protection and* "*enforcement of private rights.*"

So we repeat that all through this Court's definitions or descriptions of this "due process of law" runs this idea of "a course of judicial proceedings according to those rules and principles which have been *established* in our system of jurisprudence."

Now it is not claimed that any statute has established or authorized the remarkable procedure that was taken in this case against the Louisville & Nashville Railroad Company. Neither has it been established by custom or judicial precedent. It is purely *the Court's invention in this solitary case.* We say truly the *Court's* invention, for such it is. Counsel for defendant in error supposed of course they would have to

make the Louisville & Nashville Railroad Company *a party to the cause* before they could get a judgment against it; and they who had brought the suit and conducted it from beginning to end, *knew it was not such a party up to that time;* hence they offered to file an amended and supplemental petition *making it a party*, and praying for judgment against it. But the Court said in effect: that is not necessary; in fact it is too late to do so; just issue a rule against it to pay the judgment heretofore entered against the Louisville, Cincinnati & Lexington Railway Company and show that the Louisville & Nashville Railroad Company actually received the net earnings for which that judgment was entered, and actually defended that suit, and we will simply treat that old judgment against the Louisville, Cincinnati & Lexington Railway Company as a judgment against the Louisville & Nashville Railroad Company, and order it to pay the same, without hearing it as to any defense it may have against the claim of liability.

We submit that the fact that during all the ages in which courts have been administering justice, in equity and at law, such a thing was never done before, although equal opportunity has offered in countless cases, is conclusive that the great lawyers who have gone before us, who have made the law what it is, who are the authors of "those rules and principles which have been established in our system of jurisprudence," have never recognized in a proceeding such as this "due process of law," and that *it is not such.*

This is not the case of a new remedy necessitated and invented for an unprecedented or novel condition of affairs. Similar circumstances have existed before, as shown by the cases of Lovejoy vs. Murray, 3 Wall., 1; Elliott vs. Hayden, 104 Mass., 180, and others. But never before was such a procedure adopted as prevailed in the case at bar, and *never*

but once before was such a doctrine ever suggested, and then it was promptly rejected. (Bidwell vs. Toledo, etc., R'y Co., 72 Fed. Rep., 10.)

Moreover, not only has such a proceeding never been "*established*," but it is in direct contravention of a fundamental principle of legal proceedings which has been "established," and is strongly asserted by this Court in Pennoyer vs. Neff, 95 U. S., 714–733 (repeated and reaffirmed in Scott vs. McNeal, 154 U. S., 46), where the Court said:

> "To give such proceedings any validity there must be "a tribunal competent by its constitution—that is, by the "law of its creation—to pass upon the subject-matter of "the suit; and *if that involves merely a determination of "the personal liability of the defendant, he must be brought "within its jurisdiction by service of process within the "State, or his voluntary appearance.*"

By the term "voluntary appearance" here used by the Court, it manifestly meant appearance of record by a person who is named as a party to the record; for this is the universally recognized meaning of the term "appearance." The Court doubtless did not imagine that a case would ever arise where a court would attempt to treat a personal judgment against a particular person, named in the record, as a personal judgment against a different person who was not named in the record. Appearance certainly means at least appear ance of record, not merely appearance in the court house or association with defendant. In fact it has been the settled law of Kentucky for seventy years that even where the *record* shows a person "*appeared*" in an action, this does not make him a party, or give the Court jurisdiction to enter a judgment against him, when he is not named as a defendant in

either the petition or process. (Plummer vs. Crain, 5 T. B. Mon., 378.)

Now in the case at bar the judgment which has been held to be a judgment against plaintiff in error is, as we have seen, "essentially a personal judgment," and yet prior to the rendition thereof the plaintiff in error had never been brought within the jurisdiction of the Court by service of process, nor by entry of appearance. In fact no process had ever been issued against it. Not only so, but it was not even named in the petition, and there was no allegation against it, directly or indirectly, nor demand, nor prayer for relief, against it; so there was *nothing for it to appear to.*

The language of the learned Circuit Judge on this subject is very strong. He says:

> "It is frankly admitted that the plaintiffs had no con-
> "tract whatever with the Louisville & Nashville Railroad
> "Company, but that the contract sued on was with the
> "Louisville, Cincinnati & Lexington Railroad Company
> "and not with the Louisville & Nashville Railroad Com-
> "pany. And the record shows that the Louisville &
> "Nashville Railroad Company is nowhere mentioned in
> "the original or amended petition, nor in the captions or
> "any of them, nor in the statements, or charges, or inter-
> "rogatories, or prayer for relief, or prayer for process. It
> "is an equally apparent fact that the Louisville & Nash-
> "ville Railroad Company was never summoned or served
> "with process, or never appeared or entered its appearance,
> "or authorized its appearance to be entered in the suit, and
> "there is no averment anywhere in the plaintiffs' pleadings
> "in this suit of the legal existence of the Louisville &
> "Nashville Railroad Company." (Abstract, 45; Record, 284.)

But counsel for defendant in error argues in effect that the Louisville & Nashville Railroad Company knew plaintiff wanted to get this money *from somebody*, and it *ought* to have come into Court and filed an answer and told plaintiffs the exact facts, and made defense, assuming that plaintiffs would have sued it, if they had known the facts. But, in the first place, plaintiffs *did know the facts*, as the response shows; and, in the second place, the law imposes no such obligation on any one. In Pennoyer vs. Neff, 95 U. S., 728, the Court quotes with approval the language of Webster vs. Reid, 11 How., that:

> "*No person is required to answer in a suit on whom "process has not been served, or whose property has not "been attached.*"

No process was ever served on plaintiff in error prior to the entry of that judgment which has been held to be a judgment against it, nor was its property ever attached.

It is true that years after a final judgment had been entered against another, the Louisville & Nashville Railroad Company then had notice that it was claimed to be a *party defendant to that judgment*, and that it was proceeded against *as such*. And it had a hearing upon *that question*, and *that question only*. But that was not a hearing *upon its liability to plaintiffs;* for if it was a party defendant to that judgment then this question was foreclosed, and it would be given no opportunity to make defense of any kind against the demand of plaintiffs upon it.

But it is said it was given a hearing upon the question of whether or not the preceding judgment was a judgment against it, and the Court held it was, and that this must be the end of the matter. *This we utterly deny.* This would be in effect to hold that the judgment of the State Court, to

the effect that we have had due process of law, is final and conclusive; which, of course, can not be true, and is not true, as this Court has held.

In Scott vs. McNeal, 154 United States, 34, it appears that Scott had disappeared from home. After an absence of seven years, without his being heard from, some relative applied to the Probate Court, in the State of Washington, in the county where he had resided, to have an administrator appointed, on the ground that he was dead. The Probate Court heard the evidence, held that he was dead, and appointed an administrator. This administrator applied to the Court for authority to sell Scott's real estate, and after formal proceedings, as authorized by statute, the order was entered as sought. The administrator then sold to a certain purchaser, who in turn sold to McNeal. Deeds were passed and the purchase money paid. Scott afterward returned and brought an action of ejectment against McNeal to recover his land. McNeal defended behind the Probate proceedings. He contended that granting letters of administration is "*in the nature of a proceeding in rem;*" that "*public policy* and necessity" required that rights depending upon the death of persons long absent should be settled; that a man is responsible for the natural consequences of his acts; that these Probate proceedings were the natural consequences of Scott's acts, and that he was therefore *estopped* to complain of them and take this property back. How familiar all that sounds to one who has read the briefs of the present defendants in error!

On the other hand, Scott contended that the proceedings were not binding upon him, and "that to give effect to the Probate proceedings, under the circumstances, would be to deprive him of his property without due process of law." There was a trial. The trial Court held that the Probate

Court had jurisdiction to try the very question it did try; that its proceedings were not void; that title passed under them; and it instructed the jury to find for defendant McNeal in the ejectment suit. Scott appealed to the Supreme Court of Washington. It likewise held the proceedings of the Probate Court valid, saying, "*The proceeding is substantially in rem*"; and therefore affirmed the judgment in the ejectment suit. (5 Wash. St., 309.) Thus Scott had had a full and fair trial in the State Court on the question of whether or not he was bound by the judgment of the Probate Court; and the State Court had held that it was "substantially *in rem*" and he was bound by it. He then sued out a writ of error from this Court. This Court did not accept the judgment of the State Court as conclusive upon this question, and therefore did not dismiss the writ, or affirm the judgment, but it *reversed* the judgment, and held that the Probate proceedings were *not* binding on Scott, and that he *had been* deprived of his property without due process of law.

This case also effectually disposes of the contention made in the case at bar that the State Court merely applied the "doctrine of estoppel" to the Louisville & Nashville Railroad Company, and that this presents no federal question. Precisely this same argument was made in Scott vs. McNeal, and with much better ground to sustain it than in the case at bar. In Scott vs. McNeal the Supreme Court of the *State* in its opinion said:

"The defendants, after purchasing the property, took "possession of it and made valuable improvements. They "stand in the position of innocent purchasers, and the "question is, under this peculiar condition of affairs, which "one of the parties must suffer? The equities of the case "seem to be clearly with the defendants, for, as the matter "appears, *appellant willfully abandoned the property in*

"*question, and he certainly had reason to expect that pro-*
"*ceedings of the kind would be instituted after a lapse of*
"*years in case his relatives and other interested parties*
"*should not be able to obtain any information of his exist-*
"*ence or whereabouts.*" (5 Washington State, 309.)

When the case reached this Court, counsel for the defendant in error quoted the foregoing language of the Supreme Court of the State and said:

"These findings, if correct, are sufficient to sustain the
"judgment and *present no federal question. Their determi-*
"*nation by the State Court is therefore conclusive, and is*
"*sufficient to sustain the judgment.*"

But this Court, as we have already said, did take jurisdiction of the case and did inquire into the question of whether or not the Probate proceedings under which the property had been sold constituted due process of law.

Of course in one sense it can be said that the Court has simply applied "the doctrine of estoppel" in every case where it enforces or gives effect to a preceding alleged judgment. The doctrine of "*res adjudicata*" is but a branch of the doctrine of estoppel. Still this Court has a right to inquire, as it did in Scott vs. McNeal, whether or not the *alleged* judgment was *in reality* a judgment against the parties complaining.

In Scott vs. McNeal the Probate proceedings had been under a statute, and the State Court had necessarily passed on the validity and effect of that statute, but this Court *held that it was not bound thereby, when called on to exercise its jurisdiction under the Fourteenth Amendment of the Constitution of the United States.*

And so in the later case of C., B. & Q. R. Co. vs. Chicago, 166 U. S., 226, the Court again held that the prohibitions of

the Fourteenth Amendment apply to "all acts of the State, whether through its legislative, its executive or its judicial authorities"; and after quoting from the case of Davidson vs. New Orleans, 92 U. S., 102, to the effect that the State can not make anything due process of law which, by its own *legislation*, it chooses to declare such, then says: "The same question could be propounded, and the same answer should be made, in reference to *judicial proceedings* inconsistent with the requirement of due process of law." (Page 235.)

We therefore insist that, prior to the entry of the judgment of June 1, 1894, which the Court of Appeals has held to be a judgment against the Louisville & Nashville Railroad Company, (1) no petition had been filed aganist it—no claim made against it; (2) no process issued against it; (3) no attachment or other seizure of its property; (4) no appearance entered by it, and in fact nothing for it to appear to, (5) and that therefore the Court could not have rendered a judgment against it, if it had so desired or intended; (6) but in fact it did not render, and did not purport to render, any such judgment, but only a judgment against the Louisville, Cincinnati & Lexington Railway Company; (7) and such being the case, and the judgment, as entered in 1894, not being against the Louisville & Nashville Railroad Company, there is no process known to the law by which in 1898 it could be made, or taken to be, *a party defendant thereto*, by showing, from a supplemental investigation outside the record, that it did in fact receive the earnings for which that judgment was entered against the Louisville, Cincinnati & Lexington Railway Company; although possibly, under the circumstances, in a suit against it for those earnings, that judgment might be *evidence against it on the points therein adjudicated.* (8) It has never had a hearing or opportunity for hearing on the question of its liability to plaintiff, but only a very narrowly

circumscribed hearing on the question of whether the judgment of 1894 is a judgment against it. (9) "Whether in fact it has a defense . . . or is without defense, is not important. To assume that it has none, and, therefore, that it is entitled to no day in court, is to assume against it the very point it may wish to contest." (10) The judgment of 1898, holding that the judgment of 1894 is a valid judgment against plaintiff in error, is not binding on this Court; and the enforcement of that judgment against plaintiff in error will deprive it of its property without due process of law.

VII.

In a printed argument formerly filed by defendant in error on a motion to affirm there was a brief suggestion to the effect that the plaintiff in error, the Louisville & Nashville Railroad Company, when it filed its response to the rule to show cause why it should not pay the judgment theretofore entered against the Louisville, Cincinnati & Lexington Railway Company, had in that response pleaded to the merits as to the original question of its liability to the plaintiffs; and that the Court decided against it on such plea. *This is entirely a mistake.* No such plea was made, nor would such a plea have been received; for the only question sought to be determined on that proceeding was as to whether or not the respondent was a party to the judgment theretofore entered, and hence compellable to pay it—not the question of respondent's original liability to plaintiffs.

In support of his statement that a plea to the merits was filed, counsel quote two disconnected sentences in the fourth paragraph of the response, and argue that the respondent meant thereby to submit that it was not liable to plaintiffs, because the maker of the lease to the respondent had never

consented to the assignment of that lease to the respondent. But such was not the purpose of the allegation referred to, and neither the Circuit Court nor the Court of Appeals treated it as such, though each of those Courts delivered a written opinion on the subject of this response. The words quoted are a portion of the fourth paragraph of the response, and that whole paragraph was intended simply to show, as is manifest from reading it, that the Louisville & Nashville Railroad Company was not a *pendente lite* purchaser, and to show further the time and circumstances under which it purchased, and plaintiffs' knowledge thereof, and the continued existence of the Louisville, Cincinnati & Lexington Railway Company, by way of suggesting the theory upon which plaintiffs themselves had proceeded in suing the Louisville, Cincinnati & Lexington Railway Company, instead of suing the Louisville & Nashville Railroad Company. In other words, it was at this time being contended by plaintiff that the Louisville & Nashville Railroad Company was a *party defendant to the action*, while, on the other hand, the Louisville & Nashville Railroad Company by this response was endeavoring to show that it was not, and had never been a party to the cause, and that plaintiff *had never intended it to be a party to the cause*, but had sued the Louisville, Cincinnati & Lexington Railway Company because it was the party contracted with under the lease, and because the lessor had refused to consent to or recognize the assignment of that lease to the Louisville & Nashville Railroad Company.

As for the statement that the Court held the response on the merits insufficient, it will be seen, as suggested above, that both the Circuit Court and the Court of Appeals delivered written opinions on the subject of that response, in which *each Court purports to state the substance of the*

the Louisville & Nashville Railroad Company acquired in connection with any property referred to in the course of this litigation were, as we have seen, acquired several years *prior to the institution of this suit*, under a conveyance which was then duly recorded and of which the plaintiffs not only had notice but *actual knowledge* at the time this suit was instituted, as the response shows. (Rec., 293–295; Abstract, 50, 51.) It is manifest therefore that the judgment in this cause could not bind it as a *lis pendens* purchaser. (Dull vs. Blackman, 169 U. S., 243–248.)

MOTION TO DISMISS.

There is a pending motion to dismiss this writ for want of jurisdiction. After what we have said we do not think it necessary to add a great deal on this subject, except to show that the federal question was properly raised.

The Revised Statutes of the United States (Sec. 709) provide:

> "A final judgment or decree in any suit in the highest "Court of a State in which a decision in the suit could be "had . . . where any title, right, privilege or immunity "is claimed under the Constitution . . . of . . . . "the United States, and the decision is against the title, "right, privilege or immunity specially set up or claimed "by either party under such Constitution . . . may "be re-examined and reversed or affirmed in the Supreme "Court upon a writ of error."

In Chicago, Burlington, etc., R. Co. vs. Chicago, 166 U. S., 226, an effort was being made to condemn a right of way for a street across the right of way of a defendant railroad company. There was a verdict and judgment of condemnation, fixing the damages to the railroad company at one dollar. On motion for a new trial it claimed that its property would

by this judgment be taken without due process of law. The motion was overruled. The judgment was, on appeal, affirmed. A writ of error from this Court was allowed. A motion was made to dismiss, and this Court said:

"If the right now asserted under the Constitution of "the United States was specifically set up or claimed by "the defendant in the State Court, the motion to dismiss "must be overruled. (Rev. Stats., Sec. 709.)

"Now the right in question was distinctly asserted by "the defendant in its written motion to set aside the ver- "dict and grant a new trial. . . .

"When the trial Court overruled the motion for a new "trial and entered judgment, it necessarily held adversely "to these claims of federal right. . . . The judgment of "affirmance necessarily denied the federal rights thus "specially set up by the defendant, for that judgment "could not have been rendered without deciding adversely "to such claims of right. Those claims went to the very "foundation of the whole proceeding, so far as it related "to the railroad company, and the legal effect of the judg- "ment of the Supreme Court of the State was to deny "them. . . . There is, we conceive, no room to doubt that "the legal effect of the judgment below was to declare "that the rights asserted by the defendant under the "National Constitution were not infringed by the proceed- "ings in the case, consequently the motion to dismiss for "want of jurisdiction must be overruled."

In the case at bar the very first time that any semblance of process was issued against the present plaintiff in error, the very first time it was called on to speak, and before any order was ever made against it, except the order for the issuance of a show-cause rule, it responded and especially set up and claimed a right under the Federal Constitution in unmistakable terms as follows, viz.:

"The Louisville & Nashville Railroad Company, for "response to the rule against it herein. . . . says:

First. "That it is not a party to this suit. It has not "been named in any pleading in the case as a party, and "there is no averment made in any pleading in the case "against this respondent or that is applicable to this respond- "ent, and no judgment or order has ever been entered in "this case against this respondent, and no process has ever "issued against or ever been served on this respondent.

Second. "There has never been a time from the insti- "tution of this suit up to this time when this respondent "could, with propriety, have filed an answer setting up its "defenses against the alleged claim of the plaintiff, and *to* "*require it now to pay into Court upon this rule the amount* "*stated in the rule, or any other amount, would be to deprive* "*this respondent of its property without due process of law,* "*contrary to the Constitution of the United States in such* "*cases made and provided.*"

This specially set up and claimed a right under the Federal Constitution as plainly as could possibly have been done, and when the Circuit Court adjudged this response "*insufficient*," and made the rule absolute, and ordered the respondent to pay into Court the amount named in the rule, this was a denial of the federal right claimed in the response.

There was no assignment of errors in the Court of Appeals, because there is no such thing known to the law of the State. An appeal takes up the whole case and all rulings made by the trial court. And when the Court of Appeals affirmed the judgment of the Circuit Court, holding the response insufficient, making the rule absolute, and ordering the respondent to pay into Court the amount named in the rule, it necessarily denied the federal right claimed in the

response. And, as said by this Court in the case cited, that claim of right "went to the very foundation of the whole proceeding," and the judgment of affirmance "could not have been rendered without deciding adversely to such claims of right." There was no other ground on which the decision was or could have been rested. If that claim of right had been sustained it would necessarily have resulted in a reversal of the judgment with directions to discharge the rule.

To adopt again the language of the opinion cited:

> "There is, we conceive, no room to doubt that the legal "effect of the judgment below was *to declare that the rights "asserted by the defendant under the National Constitution "were not infringed by the proceedings in the case.* Conse- "quently the motion to dismiss for want of jurisdiction "must be overruled."

As to whether or not the property of plaintiff in error is, by this judgment, taken "without due process of law," as to whether the judgment shall be affirmed or reversed, is a question involved in the consideration of the final merits of the case. But as to the jurisdiction—"the power to hear and determine" this question so distinctly made in the State Court by plaintiff in error, and so clearly decided against it—we can perceive absolutely "no room to doubt."

Counsel say the decision of the State Court was based upon a "question of procedure." But we say that "procedure" was not "due process of law." When a subject of the Sultan of Turkey is sewn up in a bag and quietly dropped into the Bosphorus, under cover of night, without a chance to ask "Why," this may be said to be a "matter of procedure;" but it is not such procedure as in Anglo-Saxon countries would pass for "due process of law." When George Jeffreys presided at the "Bloody Assize," he was the Chief Justice of

England, and hundreds of men lost life, liberty or property by process of law; but Englishmen have never believed that the judicial tragedies of that dark day were accomplished by *due* process of law. In Murray's Lessee vs. Hoboken Land Co., 18 Howard, 272–276, this Court said: "That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' . . . It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the Government, and can not be so construed as to leave Congress free to make any process 'due process of law' by its mere will." In the much later case of Davidson vs. New Orleans, 96 United States, 97–102, in speaking again of process which had been provided by legislative act, this Court said: "Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation." And in the very recent case heretofore cited of Chicago, Burlington, etc., R. Co. vs. Chicago, 166 United States, 226–235, this Court, after quoting the language which we have just quoted from Davidson vs. New Orleans, said: "*The same question could be propounded, and the same answer should be made in reference to* JUDICIAL PROCEEDINGS *inconsistent with the requirement of due process of law.*" Manifestly it is no bar to a consideration of the question which we have submitted to this Court, to say that it is merely a "question of procedure." There lies a deeper question, and it is this: Was that procedure or process "*due* process of law?"

But counsel say the federal question was not "*seasonably* raised." They say "the opinion of the Court of Appeals

announcing the doctrine" of which we complain was delivered in 1896, and there was no claim of federal right till March 21, 1898. Counsel well speak of this as a "doctrine"; it certainly was not a judgment, as the Court itself conceded. But it was not that enunciation of a "*doctrine*" that deprived plaintiff in error of its property; it was the subsequent entry of a *judgment* in the Circuit Court and its subsequent affirmance in the Court of Appeals. And, as we have seen, before any such judgment was entered, and the very first time plaintiff in error was called on to speak, it specially set up and claimed this federal right.

Counsel lay stress on the case of Iowa Central Railway Co. vs. Iowa, 160 United States, 389. It there appeared that a suit was brought at the instance of the people of a certain community, against the Central Iowa Railway Company, to compel obedience by it to an order of the Railway Commissioners of the State requiring it to operate a certain portion of its road. In due time a judgment was entered ordering the operation as prayed for. Thereupon an appeal was taken to the Supreme Court of Iowa. *After the entry of the judgment by the Court of original jurisdiction* requiring the operation of the road, and while the appeal was pending in the Supreme Court, foreclosure proceedings were begun against the Railway Company; and in course of time the mortgage was foreclosed and the property sold, which sale took place just a month before the judgment of affirmance in the Supreme Court of Iowa. All the proceedings in the foreclosure case had taken place after the judgment of the lower Court, and pending the appeal in the Supreme Court. There were one or two conveyances after this judicial sale, and the property soon came into the hands of a corporation evidently organized for the purpose of taking the property, and which was called the Iowa Central Railway Company.

It paid no attention to the order for operation of the road; and thereupon the Attorney General filed in the Supreme Court of Iowa a petition for a mandatory injunction against this new corporation as the successor, assignee and grantee of the original defendant, the Central Iowa Railway Company, praying that it might be compelled to obey the mandate and order of Court. To that petition an answer was filed by the Iowa Central Railway Company, denying in a qualified manner that it was the successor, assignee or grantee of the original defendant, but stating facts which clearly showed that it was such. Thereupon the Attorney General moved for a judgment on the petition and answer on the ground that the answer presented no defense at all. The Supreme Court sustained this motion, delivering a written opinion which is shown in the record in that cause on file in this Court, in which it pointed out that the decree in the original cause expressly ran against "the Central Iowa Railway Company, its officers agents and servants, its *successors*, *assigns*, *lessees*, and each and every thereof;" and that while there was a qualified denial by the new corporation that it was such successor, assignee or grantee, yet the facts alleged showed beyond a doubt that it was such; and that it was therefore bound by the decree. It is difficult to see how there could be any doubt about the validity of the proceeding in question. The Iowa Central Railway Company, however, sued out a writ of error from this Court, which afterward dismissed the writ.

The manner of attempting to raise the federal question, as set forth in this Court's opinion, would seem to have been sufficient of itself to justify the dismissal of the writ. The Court says:

> "Nowhere in the answer or in the amendments to the "answer filed on behalf of the company was it claimed

"that the proceeding was violative of the Constitution of "the United States, or assailed any right, title, privilege "or immunity specially set up or claimed under that Con- "stitution. Indeed there was no mention of any right "thereunder *until the filing of a brief* for defendant en- "titled 'Defendant's resistance and objection to plaintiff's "motion to enter order prayed for in the petition,' in the "ninth clause whereof it was claimed that it would be a "violation of the Fourteenth Amendment of the Constitu- "tion of the United States to grant the order prayed for "upon the motion in question."

The argument of the counsel for plaintiff in error, as appears from his brief on file, was devoted in the first place to an elaborate examination and quotation of various statutory provisions in the Code of Iowa relating to actions of mandamus, which he contended had not been observed, a question with which, of course, this Court had nothing to do. He also argued that it was improper for the Court to sustain a *motion for a judgment* simply on the petition and answer, but that the Attorney General *ought to have demurred to the answer.* He also insisted that his client was entitled to a jury trial, a question which, of course, has no application to the case at bar. The Court does, in its opinion, speak of what constitutes due process of law, but the view which it took as to what was the real question submitted to it for decision, is clearly stated in the following paragraph near the close of the opinion:

"It is manifest that it was never contemplated by the "framers of the Constitution that this Court should sit in "review, as an Appellate Court, of such a question as that "presented by the record in the case at bar, to-wit: "*Whether or not the highest Court of a State erred in*

"holding that it could rightfully determine from the state-
"ments in the pleadings, filed by both parties to a contro-
"versy pending before it, that the averments of an answer
"set forth no defense to the claim of the plaintiff."

It seems to us that the State Court in its opinion showed beyond possible doubt from the answer of the defendant that it was the successor and grantee of the original defendant under a purchase actually made after the original decree was entered, and that it was unquestionably bound by it. And as to the question of practice, as to whether a Court could enter judgment for the plaintiff because the answer presented no defense, without first requiring a demurrer to be filed to the answer, this was so manifestly within the power of the Court, and it was so entirely plain that this presented no federal question, that it seems to us it could have presented no ground for serious dispute.

In the case at bar the federal question was presented and stated in the record at the very first opportunity; it was presented so clearly and distinctly that no one could misunderstand or overlook it; and in fact it was really *the only question* presented by the response of the Louisville & Nashville Railroad Company, when for the first time in the litigation it was called on to speak.

CONCLUSION.

We submit that the judgment should be reversed, with directions to dismiss the proceedings against plaintiff in error.

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